SUPREME COURT, U. S.

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Nos. 612 and 616 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1957

LOUIS GLENN BALLARD, PETITIONER

v.

UNITED STATES OF AMERICA

VIC BUONO, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

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OPINION BELOW

The opinion (C. A. 3–15) [1] of the Court of Appeals has not yet been reported.

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[1] The Court of Appeals proceedings appear in a volume entitled Volume 37 of the transcript of record, but this volume is not paginated in accordance with the other volumes. Therefore, the Court of Appeals proceedings are referred to herein as "C. A.". The rest of the transcript is referred to as "R.".

Pagination within the volumes also requires explanation. Volume 1 of the transcript begins with the day on which the

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1958 (C. A. 17). A petition for rehearing was denied on January 22, 1958 (C. A. 16). On February 20, 1958, Mr. Chief Justice Warren extended the time within which petitioner Buono (No. 616 Misc.) might file a petition for a writ of certiorari to and including March 21, 1958, and his petition was filed on that date. On February 21, 1958, Mr. Chief Justice Warren extended the time within which petitioner Ballard (No. 612 Misc.) might file a petition for a writ of certiorari to and including March 21, 1958. His petition was filed on March 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the indictment properly charged separate conspiracies.

2. Whether it was reversible error to have denied petitioner Ballard's motion for severance.

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jury was chosen (August 3, 1955) and includes pages 1–165, but does not contain a transcript of the jury empanelment. A separate unnumbered volume entitled "Jury Impanelment" contains these proceedings in the following pages: 36, 36–A–1 to 36–A–171. A second unnumbered volume entitled "On Appeal" contains a verbatim transcript of the proceedings had prior to trial in June and July, 1955, such as the arraignment and the hearings on motions; those numbers run from 1–A to 146–A, inclusive. Also on file with this Court is a volume also entitled "Volume I" which is to be distinguished from Volume I of the transcript which contains the indictment, appearances, motions, requested instructions, etc., and a summary of the transcript. Each document therein is numbered separately and the summary of proceedings is identified by date alone. This volume is referred to as "Summ.".

3. Whether it was reversible error to admit testimony of co-conspirator Hadzima and police officer Johnson.

4. Whether petitioner Ballard was properly charged with the commission of federal offenses.

5. Whether it was proper to allow the jury to consider accomplice testimony.

6. Whether petitioner Buono was afforded full opportunity to challenge the credibility of co-conspirator Helm.

STATEMENT

On May 25, 1955, a 10-count indictment was filed in the United States District Court for the Southern District of California charging the smuggling of and conspiracy to smuggle psittacine birds (parrots, parakeets, etc.) into the United States from Mexico (Summ., Indict., pp. 1–15). Count 1 charged that defendant Duke along with thirteen other conspirators, not defendants, conspired to smuggle psittacine birds into this country from Mexico from January to April, 1953 (Summ., Indict., pp. 1–3). Count 4 charged that petitioners Ballard and Buono conspired with Duke, and five others, not named as defendants, to smuggle psittacine birds from April 1953 to December 1954 (Summ., Indict., pp. 6–8). Count 7 charged that defendants Buono and Duke conspired with four others to smuggle birds during the period June through October, 1953 (Summ., Indict., pp. 11–12). The other counts charged substantive offenses of smuggling or receipt, concealment and transportation of smuggled birds.

Petitioner Ballard was convicted of the conspiracy charged in count 4 and the substantive offenses charged in counts 5 and 6 (R. 5192). He was sentenced to a total of 9 years imprisonment: 5 years on count 4, 2 years on count 5 consecutive to the term under count 4, and 2 years on count 6, consecutive to the term imposed under count 5 (R. 5319). Petitioner Buono was convicted of the conspiracy charged in count 7, and substantive counts 8–10 (R. 5193–5194). He was sentenced to concurrent 2 years terms of imprisonment on each of said counts with execution suspended and probation for three years. He was fined $3,000 on count 8, $1,000 on count 9, and $1,000 on count 10. The payment of the fines was made a condition of probation (R. 5319–5320).[2] On appeal, the convictions were affirmed (C. A. 3–13).

The evidence adduced by the government may be summarized as follows:

1. John Hadzima, a poultry rancher near San Diego, California, who had been importing chickens from Mexico, commenced, in 1949, to smuggle parrots into the United States along with his legal shipments (R. 268, 698, 700). Although apprehended and convicted twice, in 1949 and 1950, Hadzima nonetheless expanded his illegal activities in 1950 or 1951 by taking Nicolas Spicuzza, a childhood friend, and

[2] Defendant Duke, the only one named in all counts, was convicted on all ten counts (R. 5189–5190), and sentenced to a total of 11 years' imprisonment (R. 5318–5319). In his petition for certiorari (No. 577 Misc.) filed on February 26, 1958, Duke challenged only the trial court's refusal to allow him to discharge his counsel. A separate Brief in Opposition has been filed in that case.

others into his operation as partners (R. 128–130, 701, 865–867). The group used Segovia, Hamm, and Vosburg to bring psittacine birds[3] across the Mexican border. In November, 1952, they organized the Los Angeles Pet Exchange to dispose of the birds after importation (R. 130–133, 333, 1479).

In 1952, Segovia, Hamm, and Vosburg were apprehended by customs agents while bringing a load of birds over the Mexican border (R. 131, 132). As of that time, the partners were acquainted with petitioner Buono, who had arranged a bond for Segovia (R. 133–134, 707). At this point also, the partners first met defendant Duke, retaining him to defend Vosburg (R. 133).

2. Shortly after Vosburg's acquittal on January 13, 1953 (R. 1021), Hadzima and his partners retained Duke to handle their affairs (R. 134, 706). At this meeting Duke asked the partners to consider the possibility of flying the birds across the border, saying that he could provide a pilot (R. 136–137, 706–707, 1482). This was Robert Helm whom Duke had defended on a charge of smuggling aliens (R. 706, 1032).[4]

After the conference which resulted in the retention of Duke as general counsel for the partnership, Hadzima returned to consult with Duke alone. Hadzima had been mulling over the fact that a good many of the birds which he had shipped from Europe

[3] Broadly speaking, any bird with a hooked peak, such as parrots, parakeets, macaws, and the like, are psittacine birds.

[4] This marked the inception of the conspiracy charged in count 1 which did not name these petitioners.

had disappeared in Mexico City, and he had come to the conclusion that Spicuzza was stealing birds from him. Hadzima therefore told Duke he intended to break off his relationship with Spicuzza (R. 709–710). When Duke suggested that there were other ways of adjusting accounts, Hadzima mentioned that he planned to "hijack" the next shipment of partnership birds. Hadzima had already arranged with one Pursselley and petitioner Ballard to have them steal the next load of birds, and later informed them of the time and place to obtain access to the load (R. 716–718, 722–723). Duke was to share in the proceeds (R. 710).

A supply of birds was brought across the border in late February 1953, and left at Hadzima's house. Pursuant to Hadzima's private plan, the birds were stolen that night by petitioner Ballard and Pursselley (R. 718–720, 723–725, 728). The next morning Hadzima and Duke talked Spicuzza out of reporting the theft (R. 139–141). Duke received $600, which amounted to 10% of the proceeds, after the birds were sold (R. 729–730). It was this theft which led the partnership to give serious consideration to the notion of flying the birds in (R. 1494), but no immediate agreement was reached with Helm because of differences as to fees (R. 146, 1485–1488).[5]

In the meantime, Todd and Spicuzza went to Mexico City, collected a load of birds, and sent them north

[5] Duke had contacted Helm before this meeting, asked him to meet with the partners for the purpose of arranging smuggling flights, and instructed Helm to ask for $5,000 per trip (R. 1036–1037).

early in March, 1953, to a location just below the border (R. 147, 1488–1492). The birds were taken across the border in a truck. Once again, Hadzima had arranged to have the load of birds "hijacked" by Ballard and Pursselley (R. 739–740) and had notified Duke of his hijacking plan and promised him 10% of the proceeds (R. 747–749). After the birds were in this country being transported to Los Angeles, Ballard and Pursselley intercepted the truck, beat the driver, and took the birds (R. 759, 763–767).

After the second "hijacking", Spicuzza and the others concluded that only Hadzima could have "fingered these loads" (R. 151). They thereupon broke up the partnership (R. 153). Spicuzza communicated with Duke in order to contact Helm. On March 16, 1953, he hired Helm to fly in birds for the Spicuzza group at a price of $1,000–$1,500 per load (R. 153–154, 1043, 1045–1046). He advanced Helm $1,500–$2,000 to put toward the purchase of an airplane (R. 154, 1044, 1046). In the interim, Helm had privately promised to keep Duke informed as to each smuggling trip (R. 1041).

On March 31, 1953, Helm picked up a load of birds in Mexico and flew them across the border to Apple Valley, California, where Spicuzza and his partners met the plane with trucks to transport the birds to Los Angeles (R. 1050). In accordance with his prior promise, Helm had told Duke of the planned flight before it occurred (R. 1049). Duke passed the information on to Hadzima, at the same time arranging a division of the hoped-for spoils. Hadzima took Bal-

lard and Pursselley with him to the Apple Valley landing strip, intending to "hijack" the load (R. 779–780, 784), but the group failed to appear at the appropriate time (R. 781–782).

3. About two days later (early in April 1953), Helm went to San Diego, California, to confer with Duke. Since Duke was not in, Helm went to Buono's office, where he found Buono and Hadzima. Hadzima told Helm that he knew about the Apple Valley flight, that he intended to intercept Spicuzza's future shipments, and that he expected Helm's cooperation in the future (R. 783, 1052–1053).[6] A few minutes later, in the presence of Hadzima, Buono, Duke, and Pursselley, Helm agreed to go along with the "hijackers" (R. 785–786). It was further agreed to divide future profits equally among the five then present and Ballard (R. 787, 1057–1058). This conversation was the first overt act alleged in the conspiracy charged in count 4.

During the last week in April 1953, Spicuzza's group arranged with Helm for another importation of birds. The birds were to be picked up at El Americano, Mexico, on April 30, 1953, and delivered at Bowling Green, Kentucky, that night (R. 1057–1061). However, due to various circumstances, the birds were not brought in until May 13, 1953, when Helm transported them from Mexico to Desert Center, California (R. 1066–1080). In the meantime, Helm had kept Duke, Hadzima, Pursselley, Ballard, and Buono fully informed of the shifting plans, arrangements,

[6] This seems to have been the first time that Helm had heard of the "hijacking" arrangement.

and trips of Spicuzza's group (R. 1061, 1064, 1065, 1069, 1070, 1072, 1077–1078).

When Helm landed at Desert Center he knew that Hadzima, Ballard, and Pursselley were in the area "to pull off the hijack" (R. 1082). Therefore, Helm successfully "stalled" Spicuzza's group until the raiding party arrived and seized the birds (R. 1082–1085). During the course of the raid, after Helm had left in the airplane, Spicuzza was bound and brutally beaten by petitioner Ballard (R. 201–204, 206, 209, 1084). The birds were thereafter sold (R. 814, 1088, 1090). The Desert Center transaction resulted in the charges contained in counts 5 and 6.

About the beginning of June 1953, the participants in the "hijacking" scheme met at the Marlin Inn, San Diego, and divided the proceeds. Each share amounted to $1,750 (R. 839, 1090–1091, 1225–1226). However, Pursselley had gambled away $500 of the money Ballard had given him to give to Duke and Buono (R. 1090), and Hadzima and Ballard had to make up this deficiency (R. 831, 832, 835, 836). This led Hadzima and Ballard to conclude that they should conduct their future operations without Pursselley's aid, and the group agreed to dissolve (R. 840, 1091–1092).

4. The day after the Marlin Inn meeting, Ballard and Hadzima decided to go back to doing their own smuggling. They contacted Duke, agreed to pay him 10% of the proceeds, and ordered a supply of birds from Europe, to be consigned to Tijuana, Mexico (R. 841–846). During the period July 1953, to November 1954, Ballard and Hadzima smuggled 40–50 loads

of birds into this country from Mexico. The proceeds of the first shipment alone amounted to approximately $5,000. The sum realized from each shipment was divided as follows: Ballard received 45%, Hadzima 45%, and Duke 10% (R. 852–856). Duke earned his portion by advising Hadzima as to how best to forward money to Europe and the kind of story to be told in case of apprehension (R. 859).

5. Also in early June 1953, Helm met with Duke and Buono and explored the possibility of Helm continuing as a bird smuggler on his own. Helm believed it would be necessary to obtain another airplane, since the one previously used was by now too widely known. Buono offered to arrange the necessary financing with a Mr. Appel in Los Angeles (R. 1099–1101). Appel was contacted and on June 10, 1953, put up $2,500 toward the purchase of the aircraft Helm had in mind (R. 1103–1105). This was the start of the conspiracy alleged in count 7.

On June 5, 1953, Duke, Helm, Buono, Spicuzza, and Todd had met to discuss the bird business (R. 1105–1106). Duke and Buono assured Spicuzza and Todd that there would be no more "hijacking" if they resumed operation (R. 221–223, 1106–1107). The upshot was that Helm went ahead and purchased the new airplane to be used to smuggle birds for Spicuzza and Todd, and Buono financed a trip to Mexico City by Spicuzza and Todd to arrange for a shipment (R. 221–222, 225, 1107). Duke's idea was to "let Spicuzza go ahead and build up and we will knock him off again" (R. 1129).

On June 28, 1953, Helm and Spicuzza illegally transported a load of birds from Carbo, Mexico, to Fullerton Airport, near Los Angeles (R. 1112–1113, 1116; count 8). On July 7, 1953, Helm transported birds from Carbo to Las Vegas, New Mexico (R. 1117). On July 15, or 17, 1953, the Las Vegas routing was again utilized, and after this trip Spicuzza was able to repay the advances made by Appel and Buono to pay Helm (R. 1118–1119).

On August 6, 1953, Helm transported a small load of birds from Carbo, Mexico, to Las Vegas in a rented airplane (R. 1130).[7] On August 30 (count 9), September 17, and September 28, 1953 (count 10), three more loads were illegally brought in by Helm over the same route (R. 1130–1131).

In October, 1953, Spicuzza and Todd were tried for an earlier smuggling offense (R. 1284). In the latter part of November or early December, Spicuzza and Todd asked Helm to bring in more birds. Helm thereupon notified Mr. Vader of the Customs Service and a customs agent was waiting at the terminal point when the flight occurred (January 9 or 10, 1954) (R. 1279–1285). This appears to have been the actual termination of the conspiracy charged in count 7.

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[7] On August 4, 1953, Helm flew down to San Diego to meet with Buono and Hadzima (R. 1120). Hadzima told Helm that he intended to "hijack" Spicuzza's next load (R. 1121). That very evening, when Helm landed at Los Angeles, the landing gear collapsed and considerable damage was done to the plane (R. 1121). Helm concluded that it had been tampered with (R. 1122–1124).

ARGUMENT

1. Both petitioners, Buono and Ballard, argue broadly that their convictions derived from a "mass trial". Specifically, petitioner Buono asserts that the allegedly separate conspiracies charged in the indictment actually constituted "but one conspiracy" and that therefore his acquittal on count 4 barred his conviction under count 7. Petitioner Ballard urges that it was prejudicial error to deny his pre-trial motion for severance since, as a result, he was subjected to a mass trial in which evidence was introduced on counts in which he was not named. Neither contention is valid. Three distinct although interrelated conspiracies were charged in the indictment. The first (January to April 1953; count 1) involved an illegal agreement between Duke and the Spicuzza-Hadzima partnership to smuggle psittacine birds into the United States from Mexico by airplane. These two petitioners were not involved therein.

The second unlawful agreement involved Buono, Ballard, Duke, Hadzima and Helm (April 1953 to December 1954; count 4), although Buono was not convicted thereon. Its purpose was to hijack birds from the Spicuzza group which had split with Hadzima on the belief that he had engineered prior hijackings. The scheme was for Helm to pretend to cooperate with the Spicuzza associates by continuing to pilot their illegal shipments and to keep the hijackers up to date on the illegal shipments. This agreement resulted in the successful hijacking which formed the basis of substantive counts 5 and 6 of which Ballard was convicted.

The third conspiracy (June to October, 1953; count 7) overlapped the second in time but not in objective. In this conspiracy, the Spicuzza group resumed operations under the prodding of Duke, who assured them that the hijacking would cease, and with funds provided by petitioner Buono for the purchase of another airplane. This new arrangement resulted in numerous illegal shipments of psittacine birds to this country which formed the basis of the substantive counts on which Buono was convicted.

Hence, although several conspiracies were tied together, they clearly did not involve "the common purpose of a single enterprise * * *". *Kotteakos* v. *United States,* 328 U. S. 750, 769. In fact, the conspiracies charged in counts 4 and 7, although they overlapped, were at cross purposes and "reciprocally distinguishable from and independent of each other * * *". *American Tobacco Co.* v. *United States,* 328 U. S. 781, 788; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226, n. 59. It was necessary and proper that they be separately alleged.

In *Kotteakos* v. *United States,* 328 U. S. 750, on which petitioners rely, the evidence established eight or more different conspiracies while only one was charged. The result was that the numerous defendants were tried "*en masse* for the conglomeration of distinct and separate offenses committed by others * * *." (*Kotteakos* at 775.) Here, on the other hand, the evil condemned in *Kotteakos* was avoided by segregating the related conspiracies into distinct and separate charges with the precautionary instruction that "[e]ach defendant is entitled to have

his case, as to each count of the indictment which names him, considered individually as to him" (R. 5059). And, since they were separate conspiracies, petitioner Buono's acquittal of the conspiracy charged in count 4, far from being incompatible with his conviction of the conspiracy charged in count 7, emphasizes that the jury carefully discriminated between the two illegal arrangements.[8]

Nevertheless, the three conspiracies while separate were so interrelated that it was proper to join them and try them together. The evidence as to the hijacking, for example, would have been unintelligible without proof of its background; and, similarly, the third conspiracy could be understood only in relation to the other two. Judge Weinberger therefore correctly held, in denying Ballard's motion for severance, that joinder was permitted in this case under Rule 8 (b) of the Federal Rules of Criminal Procedure which provides, in part, for joinder where there is participation "in the same series of acts or transactions constituting an offense or offenses". (See *United States* v. *Liss*, 137 F. 2d 995, 998 (C. A. 2), certiorari denied, 320 U. S. 773). Judge Weinberger pointed out that (R. 76–A):

> Inasmuch as the ends of justice require that the judge does not allow the jury to be confused, or at least attempts to do so, as to the evidence admissible against each defendant, it is reasonable to suppose that the judge who tries the case

[8] There was persuasive evidence that petitioner Buono participated in the conspiracy charged in count 7 in that he supplied the funds which enabled the Spicuzza group to resume its smuggling operations (*supra*, p. 10).

> will be able to look out for the interests of each of the defendants, * * *.

This supposition proved to be well founded for the trial judge charged the jury (R. 5059, 5076, 5093):

> Now, this case is not one in which there is a single defendant or a single charge. There are three defendants and there are ten individual charges. Each defendant is entitled to have his case, as to each count of the indictment which names him, considered individually as to him.
>
> * * * * *
>
> Each defendant, and the Government, are entitled to have each count and each defendant separately considered.
>
> * * * * *
>
> Mr. Ballard has raised some objection to having to stand trial here with the other two, because Mr. Ballard is named in only three counts. Of course, as to each defendant you will give that defendant the benefit of special, particular consideration of that defendant, as to the counts in which he is charged.

In the face of these instructions, to say that petitioner Ballard was subjected to a mass trial because jointly tried with two other defendants is to indulge in the type of unfounded speculation concerning jury capacity rejected by this Court in *Delli Paoli* v. *United States,* 352 U. S. 232, 242–243, and *Opper* v. *United States,* 348 U. S. 84, 94–95.

2. a. The conspiracy charged in count 4, naming petitioners, was alleged to have commenced in April, 1953, i. e., when Helm specifically agreed to cooperate

and the conspirators agreed to share proceeds (see Statement, *supra*). As noted in the Statement, there was evidence that before that formal agreement in February, 1953, Hadzima, although ostensibly working with Spicuzza, had arranged with Ballard and Pursselley to "hijack" birds. In this connection Deputy Sheriff Johnson of San Diego testified that about 4:10 a. m. in the morning of February 20, 1953, he and another police officer stopped a speeding pickup truck in the county of San Diego driven by petitioner Ballard which contained about 1600 parakeets; that thereupon another car travelling behind the truck stopped voluntarily and the driver got out and approached the officers and Ballard. This individual (later identified as Pursselley) was told to leave. The officers then notified the customs authorities who came out and placed Ballard in custody (R. 1513–1 0). There is no merit in Ballard's contention th t this evidence was prejudicial as to him because it was prior to the commencement of the conspiracy in which he was named. This was evidence of acts performed by Ballard himself which tended to explain the nature of the conspiracy which he joined. It was properly admissible for such purpose although performed before the conspiracy formally commenced, just as acts after the conspiracy had ended would have been proper for such purpose. See *Lutwak* v. *United States,* 344 U. S. 604, 617, 618. Additionally, these similar transactions were material on the issue of Ballard's intent to commit the precise offenses charged since they "tended to show a consistent pattern of conduct". *Nye &*

Nissen v. *United States,* 336 U. S. 613, 618; see also *United States* v. *Liss,* 137 F. 2d 995, 998 (C. A. 2), certiorari denied, 320 U. S. 773; 2 Wigmore, *Evidence* §§ 302–304, 370 (3rd ed. 1940.)

b. Hadzima testified that from July 1953 to November 1954, after Pursselley was dropped, he and petitioner Ballard smuggled 40–50 loads of birds into this country from Mexico and shared the proceeds from the sales of these illegal shipments with defendant Duke (*supra,* pp. 9–10). In other words, they decided to do their own smuggling rather than "hijack" birds smuggled by others. This was within the period covered in count 4. On the part of Ballard, Hadzima and Duke, who directly participated therein, it was a continuation of their original agreement in another form, with Pursselley and Buono not involved. Even if it be considered as a separate conspiracy, it was so related to the conspiracy in count 4 as to be admissible against them on the issue of intent.

Since Buono was not mentioned in this evidence and was acquitted on count 4, his claim of prejudice from such testimony is without foundation.

3. Petitioner Ballard claims that, although the evidence against him might constitute robbery within the territorial limits of California, there was no showing that he ever left the United States, took part in the actual smuggling, or otherwise violated federal law.

However, the success of the conspiracy in which Ballard was involved was dependent upon the success of the Spicuzza smuggling operation. Petitioner Ballard was obviously well aware that the conspiracy

which he joined required that Duke and Helm engage in the smuggling of birds with the others, so that there would be birds to "hijack". This made him a co-conspirator in a conspiracy to smuggle. See *Direct Sales Co.* v. *United States,* 319 U. S. 703, 711. Having himself thus promoted such illegal venture, the acts of his co-partners, who were directly involved in the smuggling (e. g., Helm) as part of the ultimate plan to carry out the hijacking, are chargeable against him. *Fiswick* v. *United States,* 329 U. S. 211, 217; *Pinkerton* v. *United States,* 328 U. S. 640, 646–647.

4. Petitioner Ballard also contends that his conviction cannot stand since it is based on the testimony of accomplices. This argument has no merit. As this Court stated in *Caminetti* v. *United States,* 242 U. S. 470, 495, although accomplice testimony should be received with caution, "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." See also, *Nilva* v. *United States,* 212 F. 2d 115 (C. A. 8), certiorari denied, 348 U. S. 825; *Catrino* v. *United States,* 176 F. 2d 884 (C. A. 9); *United States* v. *Schwartz,* 150 F. 2d 627 (C. A. 2), certiorari denied, 326 U. S. 757. The trial judge here charged in accord with these principles (R. 5090):

> There is a rule regarding the testimony of accomplices. It is that a conviction may be had upon the uncorroborated testimony of an accomplice if the jury is satisfied beyond a reasonable doubt that the testimony of the accomplice is true and that it establishes the commission of the offense.

As to the care with which such testimony should be viewed, the court further charged (R. 5090):

> However, the testimony of all accomplices is to be very cautiously received and very carefully scrutinized because of the position which that accomplice has in his former relations or claimed relations with the persons against whom he testifies, so you must carefully examine it and be very cautious about it. But if you do accept it, find that it is corrobrated, or even if it isn't corroborated, if you believe it—of course, if you believe it you accept it—but in determining whether you believe it, I would urgently suggest to you that you check the other evidence to see what extent, if at all, the testimony of the accomplices is corroborated by other persons, by circumstance, by physical facts, by all other evidence in the case.

See also R. 5091–5092.

5. During the cross-examination of Helm, Duke asked a question concerning Helm's activities on July 30, 1955, a few days before the trial and long after the period charged in the indictment. In answer to an objection by the government, Duke said that he intended to show that on that day Helm had been caught smuggling and had made disclosures to customs officials about the events involved in the trial as part of a deal (R. 1323–1327). The judge ruled that he would allow proof as to smuggling (R. 1327). Helm testified that on July 30, while transporting liquor from California to Mexico, his plane crashed just over the Mexican border; that he thereupon returned to the United States by foot and called Mr. Vader of the Customs Service who picked him up

(R. 1325–1335). Helm maintained that this flight was legal, that it was cleared through customs, and that he had a manifest. The manifest was produced in court (R. 1326, 1330, 1331). In the course of this examination, the court observed (R. 1332):

> The point that counsel was going to make was that this man was smuggling, * * *.
>
> He says he had a manifest and he cleared. *Now if you have evidence that it was not so, you may introduce that evidence.* [Emphasis added.]

Subsequently, on cross-examination by Ballard's attorney, Helm testified that he discussed with Vader his participation in the events charged in the indictment and that this was his first complete statement regarding Buono and Duke (R. 1406–1407).[9] Thereafter, Duke tried to introduce a newspaper account of the July 30 crash, which the judge rejected as improper evidence (R. 1460–1462).

Buono's contention that this ruling prevented him from showing that Helm's account to Vader was "inspired" by Helm's belief that he would immunize himself from prosecution for smuggling on July 30, 1955, is thus without foundation. While the judge did not permit Duke to go into collateral details, such as the length of time Helm had been working for his then employer, the judge throughout adhered to his initial ruling that the defendants would be allowed, if they could, to prove that Helm was smuggling on July 30. Helm was in fact subjected to an exhaustive

[9] He had previously given Mr. Vader two or three statements concerning the smuggling operations (R. 1407).

cross-examination (R. 1132–1413, 1447–1477) during the course of which his credibility was repeatedly challenged (see e. g., R. 1280–1300, 1301, 1303–1305, 1320–1321).

Additionally, the jury was made acutely aware of the necessity that Helm's testimony be scrupulously examined, for the judge charged (Tr. 5085–5086):

> In determining the credibility of certain witnesses called by the government you may take into consideration motives for false accusations, as well as bias, if any there be * * *.
>
> If you find from the evidence that such witness shows a belief or even only a hope that he will secure immunity from prosecution or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis for any act or word of the United States Attorney for such belief or hope, such state of mind on the part of such witness is a matter for your consideration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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